

## The Practice of Rendition in the War on Terror

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## Introduction

*In any civilized society the most important task is achieving a proper balance between freedom and order. In wartime, reason and history both suggest that this balance shifts to some degree in favor of order—in favor of the government's ability to deal with conditions that threaten the national well-being.<sup>1</sup>*

William H. Rehnquist

The terrorist attacks of September 11, 2001, and the subsequent echoes of al-Qa'eda<sup>2</sup> inspired murder from "Bali to Turkey to Kenya to Spain"<sup>3</sup> to London,<sup>4</sup> has spawned an international "war"<sup>5</sup> that pits the United States and its allies against the forces of a "virtual"<sup>6</sup> State. In this, of course, rests the dilemma which confronts the United States and its allies—although al-Qa'eda clearly receives support from certain nations,<sup>7</sup> it is not a nation-state.<sup>8</sup> Among other things, this means that the rules for fighting the War on Terror are facing challenges not yet fully appreciated (or anticipated) by international law, let alone domestic law.<sup>9</sup> Nevertheless, as various issues present themselves, e.g., use of force, detention of enemy combatants, etc., the policy and legal considerations must be framed within the existing rule of law.

One issue that has received much attention in the context of the interrogation of suspected terrorists<sup>10</sup> is the improper use of rendition,<sup>11</sup> where some allege that the United States' sends detainees to third nations where they are subjected to interrogations that employ torture or other illegal techniques.<sup>12</sup>

Like allegations of torture, charges of illegal rendition roll off the tongue with ease and are raised by a variety of individuals and interest groups,<sup>13</sup> including Amnesty International.<sup>14</sup> For instance, in May 2005, Amnesty International issued a human rights report that reserved its most scathing criticism for the United States, claiming that the United States ignored international law and had created a network of supplicant countries to "subcontract" illegal detention and mistreatment.<sup>15</sup>

Whatever one may think of the efficacy of Amnesty International in the cause of promoting war avoidance and human rights, evaluating whether such allegations are true or not requires a lucid understanding of the applicable legal standards associated with rendition. Recognizing that the practice of sending certain individuals to third nations for questioning or detention is not itself illegal, it is imperative that one view allegations of illegal rendition with a clear understanding of the applicable legal standards set out in law. Only then can one set aside the rhetoric and objectively

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establish whether or not the United States stands in violation of the rule of law.<sup>16</sup> The purpose of this article is to briefly examine the primary international legal instrument dealing with illegal rendition.

### Defining Illegal Rendition

*Was I sent [to Syria] by the Canadians and Americans so they could get information out of me using methods that would be prohibited here?*<sup>17</sup>

Maher Arar

The primary international instrument dealing with the practice of illegal rendition is the 1984 United Nations Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention).<sup>18</sup> Article 3 of the Torture Convention makes it unlawful for any State Party to "expel, return ("refouler") or extradite any person to another State where there are substantial grounds"<sup>19</sup> to believe that the person will be subjected to torture.<sup>20</sup>

In order to understand whether a State is engaged in illegal rendition, it is necessary to first define the terms "torture"<sup>21</sup> and "other acts of cruel, inhuman, or degrading treatment or punishment."<sup>22</sup> A reading of the Torture Convention reveals that the document does not exhibit the same precision in defining what it means by "other cruel, inhuman or degrading treatment or punishment as it does with regard to torture."<sup>23</sup> The Torture Convention defines torture as follows:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is sus-

pected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind when such pain or suffering is inflicted by or at the instigation of...a public official or other person acting in a public capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>24</sup>

In summary, for torture to exist in the context of an interrogation, the criteria can be broken down as follows: First, the action must be based on an intentional act; second, the action must be performed by an agent of the State; third, the action must cause *severe pain* or suffering to body or mind; and fourth, the action must be accomplished with the intent to gain information or a confession. In adopting the Torture Convention, the United States Senate provided the following reservations which require specific intent and better defines the concept of mental suffering:

[T]he United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the sense or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subject to death, or severe physical pain or suffering, or the administration or application of mind altering substances calculated to disrupt profoundly the senses or per-

sonality.<sup>25</sup>

Article 2 of the Torture Convention is significant because it absolutely excludes the defense of exceptional circumstances to justify torture.<sup>26</sup> "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture."<sup>27</sup>

In contrast to defining torture, the companion phrase "other acts of cruel, inhuman, or degrading treatment or punishment,"<sup>28</sup> e.g., "ill-treatment,"<sup>29</sup> is not defined in the Torture Convention.<sup>30</sup> The Torture Convention certainly obliges each State party to the document to "undertake to prevent...other acts of cruel, inhuman, or degrading treatment or punishment,"<sup>31</sup> but Article 16 of the Torture Convention is the only part of the treaty that addresses the consequences to a nation that engages in ill-treatment.<sup>32</sup> In turn, interrogation practices that do not rise to the level of ill-treatment may be repugnant by degree but would be perfectly legal under international law.

But how does a State Party determine if sending an individual to a third State would be legal or illegal under the Torture Convention? In determining whether or not to send an individual to a third State for the purpose of detention or questioning, for example, the State Party is required at Article 3(2) "to take into account all relevant considerations"<sup>33</sup> with particular emphasis to whether or not there exists "*a consistent pattern of gross, flagrant or mass violations of human rights* [emphasis added]."<sup>34</sup>

Obviously, the standard for action in the Torture Convention provides a wide amount of latitude for the State Party. The combined factors of "substantial grounds" with "a consistent pattern of gross, flagrant or mass violations of human rights"<sup>35</sup> allows considerable flexibility for a State Party to justify a partic-

ular rendition. Thus, although the prohibition on illegal rendition is firmly established, the standard of evaluation is a rather subjective one. Certainly, one could argue that any nation that the United States' executive branch lists as a "terrorist nation" would probably serve as prime instance of a nation that employs torture.<sup>36</sup> In this light, receiving "assurances from Syria"<sup>37</sup> that it would not engage in torture were an individual delivered to it is clearly problematic. Furthermore, Congress regularly lists nations that it considers to be in gross violation of human rights for the purposes of providing foreign aid.<sup>38</sup> This list would also strongly indicate a prohibited State. Apparently, on a case-by-case basis, the United States does seek letters of assurance from receiving States that the person so rendered will not be subjected to torture or ill-treatment. Indeed, the federal standard for determining whether a particular rendition will stand in violation of the Torture Convention is whether it is "more likely than not"<sup>39</sup> that the individual will be tortured by the receiving State.<sup>40</sup>

If the test for illegal rendition in the context of torture is hazy, the matter is far more disappointing *vis a vis* rendition to a nation that practices ill-treatment. Inexplicably, Article 16 of the Torture Convention has no similar requirement for a State Party that might contemplate rendering an individual to a third State that practices ill-treatment.<sup>41</sup> In short, this might mean that a State Party to the Torture Convention is absolutely free to hand over an individual to a State that it knows engages in ill-treatment!<sup>42</sup>

In addition to the lack of definition of the concept of ill-treatment (or of even a minimum level of sanction in the Torture Convention), the entire definitional issue is further aggravated by a controversial and often cited European Court of Human Rights<sup>43</sup> ruling entitled *Ireland v. United Kingdom*.<sup>44</sup> The *Ireland* court specifically found certain

interrogation practices by British law enforcement agents used in Northern Ireland to be "inhuman and degrading,"<sup>45</sup> i.e., ill-treatment under the European Convention on Human Rights, but not severe enough to rise to the level of torture in the Torture Convention. According to the *Ireland* court, the finding of ill-treatment rather than torture "derives principally from a difference in the intensity of the suffering inflicted."<sup>46</sup> The use of five investigative measures called the "the five techniques"<sup>47</sup> were evaluated. These involved such actions as prolonged standing, hooding, and deprivation of sleep and food.<sup>48</sup>

## Conclusion

*All that is necessary for evil to triumph is for good men to do nothing.*<sup>49</sup>

Edmund Burke

When one addresses emotionally charged issues such as torture or illegal rendition, it is imperative that the discussion center on the applicable legal standard for the practice, the major gauge set out in the Torture Convention. The purpose of detainee interrogation, whether it is done domestically or via rendition, is to glean as much valuable intelligence as possible in order to blunt the murderous machinations of those associated with the al-Qa'eda terrorist network. The al-Qa'eda will not be kept at bay without the use of intelligence gathering which includes interrogation.

The quote by former Chief Justice William H. Rehnquist cited at the beginning of this article reminds those living in a free society that achieving a proper balance between freedom and order in time of national crisis requires a shift, to some degree, to measures associated with increased security.<sup>50</sup> While those who accuse the United States of "betraying American values by outsourcing interro-

gation to countries notorious for torture"<sup>51</sup> certainly have the right to make such accusations, the question of illegality—not *weltanschauung*—is really the touchstone. Is the United States acting in violation of the applicable international rule of law?

On the other hand, weighing the credibility of the allegations of illegal rendition is not simply understanding the rule of law—one must have sufficient facts to plug into the equation. Unfortunately, this is a difficult task since most of the media reports about illegal rendition cases cite unnamed sources and anecdotal evidence as proof. Moreover, the dilemma of separating fact from speculation is further aggravated by the government's understandable penchant for secrecy in prosecuting the War on Terror. To its credit, the government has admitted numerous crimes, errors, and missteps by its agents,<sup>52</sup> but it steadfastly denies a systemic policy of illegality in terms of the treatment of detainees and the issue of illegal rendition.<sup>53</sup> From the inception of the War on Terror, the White House has repeatedly assured the public that the United States is "in full compliance with international law dealing with torture,"<sup>54</sup> and that wherever detainees are being held they are all treated "humanely, in a manner consistent with the third Geneva Convention."<sup>55</sup>

At the end of the day, the chief enforcement tool has always been America's commitment to the rule of law coupled with the judgment of its citizens. Accordingly, it is imperative that the judgment of the people be rooted, so far as possible, in the facts and the applicable rule of law. In short, the actual rule of law regarding rendition as set out in the Torture Convention leaves much discretion to the Party State. While one can certainly agree that the rule is a prime candidate for revision, it does not follow that free license is given to critics to assert that the United States is currently violating the rule. ■

## Endnotes

<sup>1</sup> William H. Rehnquist, *All the Laws But One*, 222 (1998).

<sup>2</sup> The al-Qa'eda terror organization was founded in 1989 by a Saudi named Osama bin Laden. Dedicated to the destruction of the West, the organization has demonstrated over the past four years that it is truly international in scope with the resources and personnel to coordinate sophisticated terror attacks on a scale never before seen. It is linked to a variety of terrorist groups from the Philippines to Indonesia and has trained tens of thousands of Arab and non-Arab militants in Afghanistan under the Taliban regime. Fueled by a super-fundamentalist Islamic radicalism its foot soldiers of hate gladly embrace death in their continuing quest for mass murder. See Michael Elliott, *Why the War on Terror Will Never End*, TIME, May 26, 2003, at 29.

<sup>3</sup> See Evan Thomas & Stryker McGuire, *Terror at Rush Hour*, NEWSWEEK, July 18, 2005, at 30.

<sup>4</sup> *Id.* (describing the July 7, 2005 terror bombs in the London Underground subway on and on a bus).

<sup>5</sup> See generally Jeffrey F. Addicott, *Terrorism Law*, 15-29 (2006, 3d ed.) (arguing that use of the term "war on terror" is more than a mere metaphor, particularly in light of various acts and pronouncements of the executive and legislative bodies of government concerning the use of force as well as the nature and structure of the al-Qa'eda virtual State); see e.g., Authorization for Use of Military Force Joint Resolution, Public Law 107-40, 115 Stat. 224 (Congressional authorization for the use of force against the Taliban regime) [hereinafter Joint Resolution Against Afghanistan]; Prize Cases, 67 U.S. (2 Black) 635, 17 L.Ed. 459 (1862) (rejecting a challenge to President Lincoln's authority to blockade secessionist Southern States without a Congressional declaration of war); Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub L. No. 107-243, 116 Stat. 1498.

<sup>6</sup> See *Id.*, Addicott at 10 (describing the al-Qa'eda as "not just a terrorist group but a 'virtual State'").

<sup>7</sup> See 9/11 COMMISSION REPORT 63-70 (2004) (describing the relationship of the Taliban regime in Afghanistan to the al-Qa'eda network).

<sup>8</sup> See Addicott, *supra* note 5, at 10.

The virtual State description [for al-Qa'eda] is fundamentally valid. This virtual State exhibits many of the characteristics of the classic nation-State, but is able to walk in the shadows of international law because it has no fixed national boundaries. The al-Qa'eda virtual State has a military, a treasury, a foreign policy, and links to other nation-States. *Id.*

<sup>9</sup> One example of domestic legislation is the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001). The bill passed the Senate by a landslide vote of 98-1. 147 Cong. Rec. S11,059-60 (daily ed. Oct. 25, 2001). The House of

Representatives passed their version by a similar lopsided vote of 357-66. 147 Cong. Rec. H7224 (daily ed. Oct. 25, 2001).

<sup>10</sup> See Jeffrey F. Addicott, *Into the Star Chamber: Does the United States Engage in the Use of Torture or Similar Illegal Practices in the War on Terror?*, 92 KENTUCKY L.J. 849 (2003-2004) (arguing that the United States does not engage in a systemic pattern of torture or illegal interrogation practices).

<sup>11</sup> See *Black's Law Dictionary* (7th ed. 1999). Black defines rendition as "The return of a fugitive from one state to the state where the fugitive is accused or convicted of a crime."

<sup>12</sup> See Barton Gellman & Dana Priest, *U.S. Decries Abuse But Defends Interrogations; 'Stress and Duress' Tactics Used On Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A1; Alan Cooperman, *CIA Interrogation Under Fire; Human Rights Group Say Techniques Could Be Torture*, WASH. POST, Dec. 28, 2002, at A9. (Human Rights Watch accused the United States of violating international law by not only torturing detainees at home, but also turning detainees over to States that engaged in torture); Rajiv Chandrasekaran & Peter Finn, *U.S. Behind Secret Transfer of Terror Suspects*, WASH. POST, Mar. 11, 2002, at A1 (citing unnamed "officials and diplomats" as its primary source). *Id.*

<sup>13</sup> See e.g., Scott Shane, *The Costs of Outsourcing Interrogation: A Canadian Muslim's Long Ordeal in Syria*, N.Y. TIMES, May 29, 2005, at K11 (citing various rights advocates who denounce sending people to States notorious for torture).

<sup>14</sup> Kim Sengupta & Anne Penketh, *U.S. Terror Laws "Creating a New Generation of the Disappeared"* THE INDEPENDENT (London), May 26, 2005, at 27 (accusing the United States of engaging in torture and using surrogate nations to "subcontract illegal detention and mistreatment"). *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Black's Law Dictionary* 1332 (7th ed. 1999). The rule of law is defined in Black's as "a substantive legal principle" and "[t]he doctrine that every person is subject to the ordinary law within the jurisdiction."

<sup>17</sup> See Shane *supra* note 13. Mr Arar is a 34-year-old alleged al-Qa'eda operative from Syria that was detained at Kennedy Airport on September 26, 2002, and deported to Syria. Syria released him in October 2003.

<sup>18</sup> *United Nations Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46, U.N. FAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984). [hereinafter Torture Convention].

<sup>19</sup> *Id.* at art. 3(1).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at art. 1.

<sup>22</sup> *Id.* at art.16.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at art. 1.

<sup>25</sup> *U.S. Reservations, Declarations, and Understandings and Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment II.*(1)(a), 136 Cong. Rec. S 17491-92 (1994).

<sup>26</sup> Torture Convention *supra* note 18, at. art. 2(2). Article 2 also states that superior orders may not be invoked as a defense to torture.

<sup>27</sup> *Id.* art. 2(3) also provides that "[a]n order from a superior officer or a public authority may not be invoked as a justification for torture." *Id.*

<sup>28</sup> *Id.* at art. 16.

<sup>29</sup> See, e.g., Catherine M. Grosso, *International Law in the Domestic Arena: The Case of Torture in Israel*, 86 IOWA L. REV. 305, Oct. 2000, at 308.

<sup>30</sup> Torture Convention *supra* note 18, at art.16.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at. art. 3(2).

<sup>34</sup> *Id.*

<sup>35</sup> The term "human rights" is commonly meant to include so-called first and second-generation human rights. Through treaty and customary international law, first generation human rights are binding on all nation-states. See Restatement (Third) of the Foreign Relations Law of the United States § 702 (1987): Customary International Law of Human Rights, lists these first generation human rights as: (1) genocide, (2) slavery or slave trade, (3) the murder or, or causing the disappearance of, individuals, (4) torture or other cruel, inhumane or degrading treatment or punishment, (5) prolonged arbitrary detention, (6) systematic racial discrimination, and (7) a consistent pattern of committing gross violations of internationally recognized human rights. Second generation human rights are legally binding only on those nation-states that have obligated themselves through treaty. Second generation human rights speak to political and civil freedoms such as the freedom of religion, peaceful assembly, privacy, association, fair and public trial, open participation in government, movement, etc. Second generation human rights are the functional equivalents of democratic values found in the U.S. Constitution. See generally, Frank Newman & David Weissbrodt, *International Human Rights*, (Anderson Pub. Co.: 1991).

<sup>36</sup> Office of the Coordinator for Counterterrorism, US Department of State, Publication 11248, Country Reports on Terrorism 2004 (2005). 8 U.S.C. § 1189(a) authorizes the Secretary of State to designate foreign terrorist organizations.

<sup>37</sup> See Shane *supra* note 13 and 17. The United States accepted assurances from Syria that Mr Maher Arar would not be tortured. Mr. Arar claims that Syrian agents beat him with a metal cable and held him for ten months in a tiny cell. *Id.*

<sup>38</sup> 8 C.F.R. § 1208.17(a) (2003).

<sup>39</sup> See Bellout v. Ashcroft, 363 F.3d 975 (9th Cir. 2004) (affirming the immigration judge's determination that the petitioner had failed to establish that it was more likely than not that he would face torture if returned to Algeria).

<sup>40</sup> Office of the Coordinator for Counterterrorism, US Department of State, Publication 11248, Country Reports on Terrorism 2004 (2005).

<sup>41</sup> Torture Convention, *supra* note 18, at art. 16.

<sup>42</sup> *Id.*

<sup>43</sup> The current incarnation of the European Court of Human Rights was instituted on November 1, 1998, as a means to systematize the hearing of Human Rights complaints from Council of Europe member states. The court's mission is to enforce the Convention for the Protection of Human Rights and Fundamental Freedoms, ratified in 1953; See European Court of Human Rights homepage available at <http://www.echr.coe.int>.

<sup>44</sup> *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978).

<sup>45</sup> European Convention on Humans rights does not include the term "cruel" in describing the ill-treatment category, but makes the same distinction between torture and other inhuman and degrading treatment.

<sup>46</sup> *Ireland*, 25 Eur. Ct. H.R. (ser. A) (1978) (of the 17 judges on the panel, 13 held that the five techniques did not constitute torture. Sixteen of the judges held that the five techniques were "ill-treatment"). *Id.*

<sup>47</sup> *Id.*

- Wall-standing: Forcing the detainees to stand for some period of hours in a stress position described as "spreading against the wall, with their fingers put high above their head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers." Wall-standing was practiced for up to 30 hours with occasional periods for rest.

- Hooding: Placing a dark hood over the head of the detainee and keeping it on for prolonged periods of time except during interrogation.

- Deprivation of Sleep: Depriving detainees of sleep for prolonged periods of time.

- Deprivation of Food and Drink: Reducing the food and drink to suspects pending interrogations.

<sup>48</sup> *Id.*

<sup>49</sup> William J. Federer, *America's God And Country Encyclopedia Of Quotations* 82 (1994).

<sup>50</sup> Rehnquist, *supra* note 1.

<sup>51</sup> See Shane *supra* note 13.

<sup>52</sup> See Addicott, *supra* note 5, at 248 (noting that the military self-reported the prisoner abuse scandal at Abu Ghraib).

<sup>53</sup> Alan Cooperman, *CIA Interrogation Under Fire; Human Rights Group Say Techniques Could Be Torture*, WASH. POST, Dec. 28, 2002, at A9. "Wherever U.S. forces are holding combatants, they are being held 'humanely, in a manner consistent with the Third Geneva Convention.'"

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*